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IN THE

Supreme Court of the United States

OCTOBER, TERM, 1970

No. 1001

NATIONAL SCREEN SERVICE CORPORATION,
Petitioner,

versus

THE POSTER EXCHANGE, INC.,
Respondent.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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I

Preface

The court below, saw fit to characterize petitioner as a "grossly predatory" monopolist. (Appendix to petition, p. A. 30).

That characterization was based upon facts many

of which are not mentioned in petitioner's disjointed statement.[1]

Respondent, therefore, submits the following as a full and true statement of all the main facts of the case in chronological order.

II

The Birth Of The Business of Poster Renting

The business involved is that of supplying motion picture exhibitors with advertising posters, known as standard posters, or standard accessories.

These posters are displayed by virtually all exhibitors on the outside and in the lobbies of their theatres. They are used to draw attention to the particular merits of the picture being exhibited and also to coming attractions, and therefore, of course, a special set of posters is made up for each feature picture.

Originally the posters were produced and distributed solely by the producers of the respective pictures.

Instead of giving their advertisements away, however, — as almost all other manufacturers do — the film companies required the exhibitors to buy them, and it is this extraordinary practice that provided the foundation for this litigation.

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[1]This statement consists primarily of a rehash of the statement of facts contained in an opinion of a court of appeals of another circuit written in 1959 in connection with another case which was decided on the basis of facts not present in this case.

More fully, in all the larger cities every feature picture is exhibited a number of times, on successive runs, in different, subsequent-run theatres, and therefore the practice of requiring every exhibitor to buy a new set of posters was wasteful, because the physical make-up of the posters was such that they could be used more than once.

Recognizing this, a number of small independents, or jobbers, began the practice of acquiring extra supplies of posters, for all feature pictures, and renting them, instead of selling them, to the exhibitors operating in their particular localities, thereby using the same posters over and over again, and offering reduced prices.

These independents became known as poster-renters.

The film companies made supplies freely available to the poster-renters, and their businesses grew and prospered. As petitioner itself says (at page 5): "By 1940 there was at least one poster-renter in business in nearly every motion picture exchange area in the United States."

III

Invasion of the Business by Petitioner. Petitioner's Resort to Exclusive License Agreements

For many years prior to 1940, petitioner was a national distributor of motion picture advertising "trail-

ers," or "pre-vues," (which were short films exhibited on the theatre screen) but kept out of the business of renting standard posters.

Late in the year 1939, however, petitioner conceived and launched a plan or scheme to eliminate all of the existing poster-renters, and, with the help and connivance of the film companies, to appropriate to itself the entire poster-renting business on a national scale.

More specifically, in the early part of 1940, petitioner obtained from two major film companies (known by the short names of "Paramount" and "RKO") expressly exclusive licenses by the terms of which only petitioner would be permitted to obtain supplies of standard posters for distribution anywhere in the United States. (Exh. P-1 and Exh. P-2)

The intent to exclude the previously existing poster renters is obvious from the express terms of the contracts and also from other documents.

For instance, on January 27, 1940, petitioner's general sales manager, George F. Dembo, addressed a letter of instructions to the "Entire Sales Personnel," reading in pertinent part as follows (Exh. P.-24):

> "On February 1st, National Screen Service takes the second most momentous step of its business career. The first occurred with the creation of the company some twenty-one years ago when the trailer was conceived. Now it is Advertising Accessories, Inc., the corpo-

rate subsidiary that will handle the Standard lobby accessories formerly serviced by the producer-distributors.

"ON FEBRUARY 1st WE BEGIN SERVICE ON PARAMOUNT AND RKO PICTURES. ABOUT FEBRUARY 15th WE WILL HAVE SERVICE AVAILABLE ON UNIVERSAL. OTHERS WILL FOLLOW. AND AS RAPIDLY AS SUCH ARRANGEMENTS ARE CONSUMMATED YOU WILL BE NOTIFIED.

....

"Remember this, for it is extremely important — our immediate objective is to serve all material exclusively on a rental basis. Under no circumstances or condition is there to be an outright sale. This is a departure from customary practice. We are well aware of it, and for that reason want to caution you now about it. There cannot be any extenuating circumstances of any kind that could possibly persuade us away from this decision. Actually it is more than a decision. Our agreement with the companies we represent on Standard accessories restricts us solely to a rental handling basis and under no pretext, and not at any price, do we have the right to sell this material.

....

"We are aware of the opposition that you may receive from circuits that have their own accessories departments for relay purposes, and likewise the **poster renter** that will require our

lithographs and photos for their own rental plan. We have given this angle considerable thought and have decided upon the concession of permitting thirty days' notice to any circuit that may object on the ground that they have not been allowed sufficient advance notice covering our method of operation. For these cases, and the length of time specified, we are permitted (under authority received from the distributors) to continue the outright sale of material, but we want it confined strictly to the 'must' cases. Under no consideration, however, is this to apply to a **poster renter.** Consequently, caution must be exercised in the distribution of these exceptional outright sales, so that the material does not finally find its way into the hands of the **poster renter.** . . ." (emphasis supplied).

The immediate effect of this was to cause twenty-eight poster-renters to sell out, bag and baggage, to petitioner. These sales took place between February 1 and August 1, 1940.[2]

Other poster-renters, however, refused to sell, but they were compelled — for a time — to get along as

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[2]In passing on a question of petitioner's veracity, the trial judge said, in effect, that he could hardly believe the petitioner "... in view of its admission that immediately after it entered the competitive field in this case it actually drove twenty-eight previously established poster renters completely out of business by acquiring their businesses by outright purchase": (Appendix to petition, p. A.16).

best they could without any authorized access to posters for Paramount and RKO pictures.

IV

Petitioner's Resort to Sublicensing

For some reason not shown by the record it was not until February 6, 1942 that petitioner obtained its third expressly exclusive license at which time Loews, Inc., (also known as M-G-M) joined the plan (Exh. P-3).

As a result of this, thirteen of the still-surviving poster-renters commenced an antitrust suit in the United States District Court for the Eastern District of Pennsylvania against petitioner and Paramount, RKO and Loews. This suit was commenced on April 8, 1942, and became known as the "Allied" suit.

One year later — in April 1943 — the Allied suit was settled by a compromise agreement, the principal feature of which was that petitioner agreed to give to each of the thirteen plaintiffs a written sub-license enabling him to buy from petitioner, at fair prices, unlimited supplies of standard posters with respect to which petitioner had obtained, or might thereafter obtain, an exclusive license agreement.[3]

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[3]Respondent was not one of the plaintiffs in the Allied suit, and, as will hereinafter more fully appear, respondent was never granted a sublicense.

Following the settlement of the Allied case, petitioner continued to obtain expressly exclusive license agreements from other major film companies, with the result that by 1947 petitioner was in possession of an expressly exclusive license, to rent standard posters in the United States, from all of the eight[4] major American film companies. Specifically, petitioner's acquisitions following the settlement of the Allied case were as follows:

Licensor Film Company (short name)	Date of Exclusive License Agreement
Universal	August 1, 1944 (Exh. P-4)
Columbia	April 12, 1945 (Exh. P-5)
United Artists	January 21, 1946 (Exh. P-6)
Warner Bros.	March 22, 1946 (Exh. P-7)
Fox Film Co.	July 1, 1947 (Exh. P-8)

Prior to the signing of each of these five contracts, the poster renters, and also the petitioner, obtained their supplies of posters by buying them directly from the respective film companies, but after each contract was signed petitioner, of course, (because of the expressly exclusive provisions)[5] became the only person

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[4]At the time involved these eight companies constituted over 90% of the motion picture industry (R. 1282).

Note: The references in this brief are to the pages of the Record filed in the Court of Appeals.

[5]It is not disputed that all of the eight contracts of the 1940's were expressly exclusive. For example, the FOX contract (Ex. P-8) provided in section THIRTEENTH as follows:

> "... FOX agrees that it will not during the term of this agreement grant to any person, firm or corporation other than SCREEN, any license to distribute or

able to deal with the film-company licensor, and therefore all the other renters had to look to petitioner — their giant competitor — for all of their supplies in accordance with their sublicense agreements. For a number of years, petitioner complied with its sublicense agreements, and thereby kept a number of competitors in business, but (as will hereinafter more fully appear) on May 16, 1961 — in accordance with notice given on February 15, 1961 — petitioner unilaterally and absolutely discontinued the practice, thereby leaving all competitors without any possible source of supplies.

V

Petitioner's Stated Reasons For Wanting Exclusivity

With respect to petitioner's explanation of the reasons why the first license agreement (which was made with Paramount in 1940, as aforesaid) was made exclusive, the record shows that in another proceeding petitioner itself said:

> "In the latter part of 1939, Paramount Pictures, Inc., desiring to avoid future losses which continuance of the production and distribution of standard accessories entailed, approached National Screen with a proposition

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manufacture (and FOX will not itself distribute) within the territory of this agreement, any standard accessories based upon FOX motion pictures...."

In section SECOND the territory covered was described as "the territory of the United States of America (including Alaska and Hawaii, but not its other territory and possessions)".

> for the turning over of this function to National Screen. To ensure wide and prompt distribution of standard accessories to its customers, Paramount Pictures, Inc. required National Screen to operate a local branch in each city where Paramount Pictures, Inc. had a film distributing exchange. National Screen was required to open new exchanges throughout the country at its own expense and to employ the required sales staff in each exchange....
>
> "The opening of new exchanges throughout the country required National Screen to assume leasehold and other obligations and required an investment involving millions of dollars. To protect its investment, National Screen in its negotiations with Paramount Pictures, Inc. required that it be given an exclusive license to produce and distribute Paramount standard accessories for a five year term."*

There is nothing on the record to show what reasons petitioner had for wanting and obtaining the expressly exclusive provisions in the seven subsequent agreements, but in the petition filed it is stated that (p. 6):

> "Similar considerations were involved in the other Producers' standard-accessory arrangements with National Screen."

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*These statements were made by petitioner in the form of requests for findings of fact filed of record in the case of *Lawlor v. National Screen Service Corp.*, Civil Action No. 10,020 (E.D. Pa., 1958)

VI

Petitioner's Profit Sharing

With respect to consideration — moving from petitioner to the film companies — each contract required petitioner to pay a share of its profits (usually 50%) to the film company licensor. As a result of this, petitioner has paid each film company many thousands of dollars every year for the privilege of distributing that film company's advertising posters. Petitioner admits — or proclaims — (p. 6) that the film companies' reasons for contracting with it was that they had been losing money "in their accessories business."

VII

Means of Production of Standard Accessories

The petition (pages 2, 5, 6) represents that standard posters are "created" and "produced" by petitioner, but that is incorrect.

The contracts plainly show that the posters have always been produced by professional lithographers on the basis of drawings, sketches and other art work prepared by artists working in the studios of the film companies, and paid by them.

The only change made by the contracts was that the film companies agreed to deliver the art work to petitioner (upon payment of a fee) instead of sending it directly to the lithographers (referred to in the con-

tracts as "vendors"). This, of course, enabled petitioner to place the orders for reproduction with the lithographers, and thus obtain exclusive possession of all posters produced.

For illustration, petitioner's contract with *Fox Film Corp.*, (made June 30, 1947, as aforesaid) provided, in pertinent part, as follows (Ex. P-8, p. 3):

"*FIFTH*

"*PREPARATION AND MANUFACTURE OF STANDARD ACCESSORIES HEREUNDER*

"It is the intention of the parties that all standard accessories distributed hereunder will be prepared and manufactured in the same manner (unless otherwise herein provided) as prior to the execution of this agreement, or as according to the then custom of the trade if FOX so requests, except that during the term of this agreement the orders for such manufacture from the vendors and the payments for such manufacture to the vendors will be made directly by SCREEN. It is, therefore, understood as follows:

1. Art Work

"FOX shall prepare its own rough sketches, finished drawing (color or otherwise), visuals and layouts and shall furnish SCREEN direct, or its designated lithographer or manufacturer

> of standard accessories herein, the necessary finished art work from which the various standard accessories are to be made, and SCREEN shall pay to FOX for such finished art work a sum of Two Hundred and Fifty ($250.00) Dollars for each regular feature release and a sum of Five Hundred ($500.00) Dollars for each special feature release, . . ."

Substantially the same provisions are contained in all the other seven exclusive contracts.

It is true that the contracts required petitioner to pay the charges of the lithographers for producing the posters, but this was part of the consideration paid by petitioner for its exclusive privileges. In other words, the posters always remained the property of the film-company licensors.

For example, all the contracts provided that:

> "Screen shall not give away the standard accessories licensed hereunder, nor sell nor otherwise pass title from Screen to such standard accessories . . ."
> (Exh. P-8 at p. 1).

Furthermore, the FOX contract, for example, contained a provision with respect to copyrights as follows (Exh. P-8, p. 23):

> " . . . SCREEN will affix or cause to be affixed to each standard accessory distributed

> hereunder the following copyright notice: 'Copyright (194) Twentieth Century Fox Film Corporation', and SCREEN will permit no act of commission or omission which will destroy or impair the copyright of any material furnished by FOX to SCREEN hereunder . . ."

All other contracts contained substantially the same provision.

It is therefore incorrect to represent petitioner as either the producer or the owner of standard accessories.

Petitioner is and always has been, like respondent, and all other poster renters, a mere distributor. The only material difference is a difference in size.

VIII

The So-called "Non-Exclusive" Renewal Agreements

Almost all of the expressly exclusive agreements expired at the beginning of the year 1950, and were replaced by nominally "non-exclusive" renewal agreements, but no substantial changes were made, and the result was that petitioner retained practically all of its previously held exclusive privileges.

The reason for this is that although the 1950 renewal agreements provided that the film companies might grant licenses to distributors other than peti-

tioner they also expressly provided that no applicant could be granted a license unless he had, or would guarantee to get, a national distribution organization, and would undertake to do business on a national scale, all of which, as has been seen — would admittedly require an investment of "millions of dollars", and as far as can be ascertained from the record in this case no poster renter other than petitioner has ever dreamed of having that much money.

For illustration, the FOX 1950 renewal agreement provided, in pertinent part, as follows (Ex. P-14, p. 35-37):

"THIRTY-FOURTH

"FAVORED NATION CLAUSE TO SCREEN: RESTRICTIVE COVENANT AGAINST FOX

"....

FOX further covenants and agrees that it shall be the essence of this agreement that no license shall be granted to any other licensee in respect to standard accessories, specialty accessories and trailers on 'Fox motion pictures' unless such license shall be in the form of a written agreement and shall require (a) that the licensee shall be obligated to manufacture or cause to be manufactured or produced and to distribute all three items, to wit, standard accessories, specialty accessories and trailers, and (b) that the licensee shall be obligated to distribute standard accessories, spe-

cialty accessories and trailers of 'FOX motion pictures' on a 'national basis.' The term 'national basis' is herewith defined to mean the ownership, operation and maintenance of exchange offices and employment of adequate and efficient personnel therein, throughout the exchange center cities where SCREEN is required under the terms of this agreement to own, operate and maintain exchange offices in connection with the distribution of standard accessories, specialty accessories and trailers of 'FOX motion pictures' hereunder. FOX agrees to furnish to SCREEN upon request a copy of any agreement which it may enter into with any other licensee, and in any event FOX shall notify SCREEN promptly upon its granting a license to another licensee of the happening of such event."

.....

Commenting on the foregoing, the court below aptly said (Appendix to Petition, p. A. 26-A. 27):

"... In order for another company to have acquired a license it would have had to make a multi-million dollar investment. The producing companies under their 'Most Favored Nation' clauses required nationwide distribution facilities, full line producing and direct competition with National Screen's already established organization. Moreover, Poster was only a local distributor-jobber. And the District Court was entitled to conclude that Post-

er cannot be required to convert the nature of its business, make a multimillion dollar investment and become a nationwide distributor just to survive in the Atlanta area. See United States v. Aluminum Company of America, Inc., 2 Cir. 1945, 148 F. 2d 416."

IX

Petitioner Reverts to Exclusivity Termination of the Sublicensing System

The petition states, (p. 6) — and it is not disputed — that as a result of the compromise settlement reached in the Allied case, in 1943, petitioners "entered into sublicense agreement with twenty-four poster renters, including eleven who were not parties to the case."

In other words, petitioner, for a time, actually created and nourished its own competitors in at least twenty-four cities in various parts of the country.

All of these sublicenses expired long before 1961[7] but for some reason or other petitioner continued to pump the blood of life into a goodly number of competitors until May 16, 1961, when, as aforesaid, petitioner unilaterally and absolutely discontinued the practice.

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[7]No sublicenses were granted after 1950 (R. 1112).

In other words, on May 16, 1961, petitioner put its virtually complete monopoly power into full force and effect with the result of eliminating practically every vestige of competition throughout the nation.

In the trial court petitioner contended that its reason for the 1961 cut-off was that it had been losing money in the standard-accessory phrase of its business, and that, therefore, its action was a "legitimate exercise of business judgment"; but the alleged losses were based upon the conclusions of a bookkeeper in allocating home-office expenses (because petitioner's business as a whole was admittedly not in the red) and in view of all the evidence the trial judge rejected the contention and found that the real reason for the cut-off was petitioner's intent to eliminate its competitors.

More specifically, the trial court found (Appendix to Petition A. 10):

> "24. The evidence does not support the defendant's position that its refusal to deal with the plaintiff was dictated by sound business policy."
>
> "25. The Acts and conduct of the defendant described above were clearly with the intent of eliminating the plaintiff as a competitor in the Atlanta Exchange Area . . ."

X

Petitioner's Extraordinary Treatment of Respondent. — Respondent Never Granted A Sublicense

The respondent — a corporation — began doing business as a poster renter in the City of Atlanta, State of Georgia, in 1941.

At that time respondent was able to, and did obtain all desired supplies of posters directly from all of the eight major film companies notwithstanding that, as aforesaid, petitioner had acquired two exclusive contracts in 1940. The apparent reason for this is that petitioner did not get into full operation in the Atlanta area until some time after respondent opened for business in 1941.

As aforesaid, all of respondent's subsequent requests for a sublicense were refused,[8] but until the 1961 cutoff petitioner always allowed respondent to buy at least some amount of supplies over which petitioner, from time to time, acquired control, as aforesaid.

As far as the record in this case discloses, those poster renters to whom petitioner granted sublicenses

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[8]At the trial petitioner's general sales manager testified that the reason for refusing to give respondent a sublicense was that one of respondent's stockholders was a stockholder also in another poster-renting company doing business in another part of the country, and, as the witness said (R. 764):

> "We didn't mind the individual exchange centers having an operation but we didn't want to have the big bugaboo of one man operating ten or twelve exchange centers against us."

were always able, while the system lasted, to obtain adequate supplies at reduced and fair prices, but as the evidence in this case shows, respondent was very frequently unable to obtain a sufficient amount of supplies, and always had to pay over-the-counter prices, which were substantially higher than the prices paid by the sublicensés (R 207). The sublicensees were authorized to place "standing orders" under which adequate supplies for all feature pictures of all producers were automatically shipped to the offices of the sublicensees, (Exh. P-47) whereas respondent was required to go to petitioner's local exchange in Atlanta and try to buy supplies over the counter, just as any member of the public might do (R 99-100).

XI

Proof of the Fact of Loss and Amount of Damage

The witness, William Gearing, testified that he began working for respondent in 1946 or 1947 (R. 537) and that he was practically in charge of the business from 1954 to 1962 (R. 538); that when he started working he had about 200 accounts — meaning that he serviced about 200 theatres (R. 539); that over the years the quantity of supplies he could obtain was so limited that he was able "to service about half, a little over half of the customers" (R. 207) and that the other half "stopped doing business with us and started doing business with National Screen" (R. 207).

This evidence, besides being uncontradicted, is borne out by all the other evidence in the case.

Specifically, the undisputed financial data shows that during the four-year damage period (July 17, 1957 through July 16, 1961)[9] petitioner transacted about seventy-seven (77%) percent of the total business done in the Atlanta area in standard accessories, and the respondent only twenty-three percent, whereas the uncontradicted testimony of respondent's president, William Cobb, was that when respondent opened for business (in 1941) respondent "had 60 percent or 70 percent of the business" (R. 261).

With respect to prices, the witness, George Tarrant, testified that he was petitioner's branch manager from 1959 to 1962 (R. 88), and that respondent was charged the same price that was charged to respondent's potential customers — the exhibitors — when they desired to purchase, instead of renting, the posters (R. 99-101).

Petitioner's own witness (George Dembo, general sales manager) testified that a sublicensee could "buy all the material that he wanted" (R. 751) and "had a favored rate" (R. 766), and petitioner's local office manager, Charles Lester, testified that he would sell petitioner what he had "on hand," and added that: "But anything we were short of, he would just be out of luck" (R. 494-496).

Further with respect to amount of damage, petitioner proved that in the area involved (the motion

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[9]The trial judge found that the damage period in this case is the four-year period preceding the commencement of the suit on July 16, 1961: ((Finding of Fact No. 26, Appendix to the Petition p. A.11).

picture district of Atlanta, Georgia) the petitioner's net receipts — (gross receipts less cost of posters used) — during the four years immediately preceding the date of the filing of the complaint — was $436,745, whereas respondent's like receipts, for the same period, was only $119,292, — a difference of $317,453.

On the basis of this evidence, together with the federal four-year statute of limitations of actions, the trial judge found as a fact that (Appendix to the Petition p. A. 11):

> "26. The period for which plaintiff is entitled to recover damages from defendant in the instant case includes the four years immediately prior to the filing of the complaint ..."

Accordingly, the court awarded respondent damages in the amount of $150,000, trebled to $450,000, which, as the Court of Appeals said, was substantially less than it might have been under the evidence.

ARGUMENT

I

There Is No Conflict With Either The Lawlor or Vogelstein Case

Vogelstein[10] itself cannot create a conflict because

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[10] *Vogelstein v. National Screen Service Corp.*, 204 F. Supp. 891 E.D.Pa. 1962) aff'd per cur. 310 F.2d 738 (3d Cir. 1962).

it was dismissed on a motion for summary judgment without any trial or other hearing on the merits. The basis for the judgment of dismissal was that Vogelstein had agreed — by a formal stipulation filed of record — to be bound by the results to be reached at the trial of the Lawlor case, and the trial of *Lawlor*[11] (to the court without a jury) resulted in entry of a judgment for the defendants.

Therefore the real question is whether there is a conflict with *Lawlor*.

The answer is that there is no conflict because *Lawlor* is distinguishable on its facts, and the court below has consistently taken that position.

The period of time covered in *Lawlor* was 1943-1949 (the suit having been commenced in 1949, and the statute of limitations being six years, at that time, under Pennsylvania law). Throughout those years, the plaintiffs in *Lawlor* were among National Screen's sublicensees, and in that capacity they received from National Screen ample supplies of posters at fair prices, as a result of which they were unable to show that they ever suffered any loss.

Specifically, the trial judge in *Lawlor* found the facts as quoted below:

> "73. From April 21, 1943, the date of the sublicense to the plaintiffs from National Screen,

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[11] *Lawlor v. National Screen Service Corp.*, Civil Action No. 10,020 (E.D. Pa. 1958) aff'd 270 F.2d 146 (3d Cir. 1959).

and throughout the period in suit the plaintiffs received from National Screen all of the standard accessories which they ordered..."

"122. During the period in suit, i.e., from 1943 to 1949, plaintiffs' business was progressively more successful, with increased gross volume and profits. The gross income from plaintiffs' business went up regularly year to year from 1943 to 1949, and, in fact, plaintiffs' gross doubled during this period. The profits of plaintiffs' business also increased each year between 1943 and 1949."

"138. From 1943 to 1949, the period in suit, the plaintiffs suffered no damage or injury to their business or property as a result of any action of any of the defendants herein complained of by the plaintiffs."

As has been seen, respondent was never given a sublicense and as a result was frequently unable to obtain adequate supplies, and always had to pay excessive prices, as a result of which the trial court awarded respondent damages in the amount of $150,000, trebled to $450,000.

The court below first dealt with *Lawlor* in 1962 on National Screen's appeal from the refusal of the district court to enter summary judgment for National Screen on the strength of *Lawlor*. In affirming the district court, the court below said (*National Screen Service Corp.* v. *Poster Exchange, Inc.*, 305 F 2d 647, 652, Cir. 5, 1962):

> "National Screen relies heavily upon the well written opinion in the case of Lawlor v. National Screen Service Corp., 3 Cir. 270 F. 2d 146(1959) ....Attached to one of the affidavits of National Screen are a total of 140 findings of fact and 12 conclusions of law by Judge C. William Kraft, Jr ....Such findings and conclusions of the District Court are noteworthy. The court found that the plaintiffs in that case failed to submit evidence that National Screen ...failed to fulfill plaintiffs' requirements and requests for accessories ...and that the plaintiffs suffered no damage or injury to their business or property as a result of any action on the part of National Screen....
>
> "The facts and the period of time involved in the Lawlor case are substantially different from those under consideration in the instant case...."

It is therefore very plain that there is no conflict between the decision rendered in this case and the decision rendered in *Lawlor* or *Vogelstein*.

II

The Consent Decree Entered In The Government Suit Is Irrelevant And Immaterial

Some years prior to 1957 the Government filed a suit against all the parties to the exclusive license agreements alleging a conspiracy to monopolize and actual

monopolization. As stated by petitioner (p. 7) "The complaint specifically referred to, and sought relief for, the poster renters." In 1957 — without any trial or other hearing — consent decrees were entered prohibiting such exclusive agreements and requiring the film-company defendants to grant licenses to all "qualified" applicants. The trouble is that the decrees went on to say that no film company could be required "to regard an applicant as qualified unless he had, or would guarantee to get, national distribution facilities and would agree to do business on a national scale."

As has been seen (p. 7, *supra*) the admitted facts are that the cost of setting up national distribution facilities (requiring establishment of several dozens of district offices) amounts to "millions of dollars," and that petitioner itself insisted that it be given exclusive privileges before it agreed to make such an investment.

Petitioner says (p. 23): "There was no evidence and no finding that any Producer would in fact impose such requirements (except on National Screen)."

But there is no reason to think that any producer would favor anyone over National Screen, and, as has been seen, (p. 11, *supra*) the nominally "non-exclusive" renewal agreements of the 1950's contained a "favored nations section," in favor of National Screen, guaranteeing that no poster renter other than National Screen would be granted a license unless he had a national distribution organization.

All of the eight exclusive agreements of the 1940's very emphatically required National Screen to cover the nation. For example, the Fox agreement, in section fourteenth, provided as follows (Ex. P.-8, p. 21):

> "....
> SCREEN agrees that it will at all times during the term hereof maintain an adequate and efficient national sales force. Without limitation of the foregoing, SCREEN agrees that it will at all times during the term hereof, maintain an office with an adequate and efficient sales force in each city in the territory of this agreement in which FOX now maintains an exchange and SCREEN agrees that if in the future FOX opens any exchanges in the territory in cities where it does not maintain an exchange, SCREEN will likewise open an office with adequate and efficient sales force in such city, if and when two or more so-called major distributors besides FOX have exchanges in said City...."

Substantially the same provision was inserted in all of the other seven exclusive license agreements (Exhibits P-1 through P-7).

In view of this evidence, the trial judge found, in Findings Nos. 16 and 17 as follows (Appendix to Petition p. A. 7, A. 8):

> "16. National Screen's licenses from the major distributors have been nonexclusive since

> at least as early as 1957 and any qualified applicant as defined by said consent decree has been free to negotiate with the major distributors relative to obtaining nonexclusive licenses to manufacture standard motion picture accessories. However, the distributors of motion picture films have traditionally insisted that licensees to manufacture its accessories have national distribution facilities, and since National Screen is the only concern meeting such requirement, National Screen is the only concern in fact licensed to manufacture and distribute standard accessories on films distributed by or through the major motion picture distributors."
>
> "17. Plaintiff herein does not have nor has it ever had facilities or resources to manufacture or national distribution facilities with which to distribute standard motion picture accessories. Plaintiff has never been engaged in the business of manufacturing accessories."

Clearly, therefore, the trial judge drew the inferences differently from petitioner, and, in view of the evidence, the court of appeals did not err in sustaining the findings.[12]

Petitioner also argues a second point based upon a letter written by National Screen and read into the

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[12]It should be noted that the consent decree has had no beneficial effect because, as the trial judge found, no licenses have been granted other than to National Screen.

record by one of the assistant attorneys general engaged in handling the case.

This remarkable letter, written on the letterhead of National Screen Service Corp., and signed by its president, Herman Robbins, is quoted below:

"Dear Judge Hansen:

"Re: United States v. National Screen, et al.

"In connection with the discussions leading up to the entry of the consent decree in the above case, we wish to advise you that it is the intention of National Screen to continue serving poster renters for a period of one year from the date of entry of this decree.

"Very truly yours,

"Herman Robbins."

On the basis of that letter petitioner poses the following argumentative question (p. 25):

"...How could the courts below find that National Screen's 1961 refusal-to-deal was motivated by a 'specific intent to monopolize' and 'would result' in a 'monopoly' (A. 26 n.12) in the face of the fact that National Screen had been assured by the Government's judgment that a refusal to deal with the poster renters,

> after one year from entry of the judgment, would not constitute monopolization if the Producers and National Screen abided by the judgment?. . ."

There are several good and sufficient answers to that question.

First, the letter is obviously nothing but a wholly gratuitous self-serving declaration. As the petitioner itself admits (p. 7) the consent decrees were entered without any trial on the merits, and "without determination of any issue by the court," and therefore, of course, the court could not reasonably have placed any kind of limitation on the future existence of the poster centers. The letter, of course, was not made of part of the decrees.

But even if the court had incorporated the letter into the decrees the rights of respondent could not be in any way or to any extent affected thereby.

For this Court has definitively held that the private suit is such a vital and wholly independent means of enforcing the antitrust laws that none of the rights of the private plaintiff can ever be impaired by the results reached in a Government case: *Fox Publishing Co. v. United States*, 336 U.S. 683 (1961).

In the above cited case, the Court, in a unanimous opinion, said:

"We regard it as fully settled that a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation, and hence may not, as of right, intervene in it." (366 U.S. at 689)

"...just as the Government is not bound by private antitrust litigation to which it is a stranger, so private parties, similarly situated, are not bound by government litigation ... Indeed sec. 5 of the Clayton Act (15 U.S.C. sec 15) making an adjudication of liability in a government antitrust suit prima facie evidence of liability in a section 4 private suit would seem to be a definitive legislative pronouncement that a government suit cannot be preclusive of private litigation, even though relative to the same subject matter." (366 U.S. at 690).

Petitioner argues that "...the business community and the bar must not be left in doubt about the effect which a judgment entered in a government suit will be given in subsequent private litigation..." (p. 26) — as if there could be any such doubt in view of *Fox Publishing Co.* But then again petitioner does not cite *Fox Publishing Co.* Perhaps it was overlooked.

III

The Evidence Amply Sustains The Trial Judge's Award of Damages In The Amount Of $150,000, Trebled to $450,000.

Petitioner argues that respondent was entitled to recover only for losses sutained during the nine-week period beginning May 16, 1961 (when petitioner cut off furnishing supplies of posters) and July 17, 1961, (when respondent's suit was commenced.)[18]

The only thing said in the petition to support the conclusion that the beginning date is May 16, 1961, is contained, under another heading, in footnote 20, page 20, as follows (citations omitted):

> "20. That the refusal to deal after May 16, 1962 was the gravamen of Plaintiff's complaint and amended complaint is clear. This was confirmed by Plaintiff's pre-trial statements of contentions and issues, submitted just before the trial. . . ."

The petition does not set forth the text of any of the statements which are said to make clear that the

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[18]Petitioner has constantly tried to make this case appear as a typical refusal to deal case, commencing with the May 16, 1961 cut-off of supplies. But that is a false picture of the case. As has been seen (p. 8-10, supra) petitioner is not the producer of standard accessories. Like respondent, petitioner is a distributor only, in competition with respondent. Therefore petitioner and respondent should not be dealing with each other at all.

gravamen of the case is the refusal to deal after May 16, 1961. The full texts were set forth in the briefs filed in both the trial court and the court of appeals, and both of those courts rejected petitioner's construction of the documents, and upheld respondent's contention that the claim made was for losses sustained during the four-year statutory period.

Specifically, the trial judge, in finding 26, found as a fact, as aforesaid, as follows (Appendix to Petition p. A. 11):

> "26. The period for which plaintiff is entitled to recover damages from defendant in the instant case includes the four years immediately prior to the filing of the complaint. The complaint was filed July 17, 1961, thus the period involved is 168/365 of the year 1957, all of the years 1958, 1959 and 1960, and 197/365 of the year 1961."

And in affirming that finding, the court of appeals said (Appendix to Petition, p. A. 25):

> "Second, National Screen contends that Poster ain pretrial response to a discovery request and in its pleadings, there had been admissions that precluded imposing liability for pre-1961 acts. But we think it is plain that the District Court did not read these as reflecting a final, absolute judicial admission; nor do we. At most they related solely on the ultimate issues as just a few more pieces of evidentiary

> footage, which the District Court could, but was not required to credit. As a last reel, the whole trial would have been a waste. That DeMille epic would not have been carried out if anyone, including the Judge, believed that Poster exchange after years of protest were now telling the Judge that until 1961 everything was rosy."

And later on in its opinion the court similarly said (Appendix to Petition p. A. 29):

> . . . .
>
> "National Screen's basic argument about the amount of damages is that Poster was entitled to recover damages only from the time of the complete refusal to deal in 1961. In final analysis, however, this contention rests on the argument that Poster had by pre-trial admissions abandoned its theory of liability for the pre-1961 acts and on the argument that the District Court's findings of fact regarding this period are not supported by the record. We have of course rejected both of these contentions. Thus on the findings we have credited that Poster was entitled to recover damages for that wrong as well as for injury resulting from National Screen's complete refusal to deal in 1961."
>
> . . . .

Since petitioner does not set forth the texts of the alleged admissions it is submitted that this Court

should assume that the courts below correctly decided the issue, and that, therefore, respondent is entitled to recover for losses sustained over the full four-year statutory period.

With respect to the amount of the award, the evidence upon which the trial judge based his conclusion of $150,000 is summarized at page 30 *supra*. It is obviously sufficient to sustain the award in accordance with the principles announced in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946).

Finally it is noted that at page 30 the petition erroneously states that the calculations were based upon "gross income" and "gross receipts." The fact is that the calculations were based on *net receipts*, in accordance with *Bigelow*. The court of appeals expressly said net receipts (Appendix to Petition p. 29, bottom of page).

CONCLUSION

For the foregoing reasons petitioner's prayer for a writ of certiorari should be denied.

Respectfully submitted,

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